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No. 92-1839

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

COLGATE-PALMOLIVE COMPANY,
Petitioner,

v.

FRANCHISE TAX BOARD,
An Agency of the State of California,
Respondent.

On ~~Petition for a~~ Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether congressional consent to state action, which precludes judicial scrutiny of such action under the dormant Commerce Clause, may be found in congressional silence.

2. Whether worldwide combined reporting as applied to a U.S.-based multinational group frustrates federal foreign policy, in violation of the Foreign Commerce Clause.

RULE 29.1 STATEMENT

There are no changes to the Rule 29.1 Statement since the Supplemental Brief of Petitioner was filed with this Court on October 18, 1993.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeal of California (Pet. App. B at 2a-26a)[1] is reported at 10 Cal. App. 4th 1768, 13 Cal. Rptr. 2d 761 (3d Dist. 1992). An earlier opinion of the Court of Appeal of California in the same case (Pet. App. E at 29a-73a) was reported at 233 Cal. App. 3d 855, 284 Cal. Rptr. 780 (3d Dist. 1991). The

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[1] References to the appendix to the petition for certiorari are denominated "Pet. App." followed by a letter assigned to each item and a page reference. References to the joint appendix accompanying this brief are denominated "J.A." followed by a page reference. References to the appendix to the petition for certiorari in the companion case of *Barclays Bank PLC v. Franchise Tax Bd.*, No. 92-1384, are denominated "*Barclays* Pet. App." followed by a letter assigned to each item and a page reference. References to the joint appendix accompanying the brief of petitioner in *Barclays* are denominated "*Barclays* J.A." followed by a page reference.

opinion of the Superior Court of California (Pet. App. F at 74a-103a) is unreported.

JURISDICTION

The judgment of the Court of Appeal of California, Third Appellate District, was entered on November 20, 1992. Pet. App. B at 26a. The Supreme Court of California denied review on February 18, 1993. Pet. App. A at 1a. The petition for certiorari was filed on May 19, 1993, and was granted on November 1, 1993. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution, U.S. Const., art. I, § 8, cl. 3, provides: "The Congress shall have power . . . [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Section 25101 of the California Revenue and Taxation Code, Cal. Rev. & Tax. Code § 25101 (West 1992), which was in effect for the years at issue, provides: "When the income of a taxpayer subject to the tax imposed under this part is derived from or attributable to sources both within and without the state the tax shall be measured by the net income derived from or attributable to sources within this state in accordance with the provisions of Article 2 (commencing with Section 25120)."

STATEMENT

This case, like the companion case of *Barclays Bank PLC v. Franchise Tax Bd.*, No. 92-1384, raises the question whether the Foreign Commerce Clause precludes a state from requiring a multinational group of affiliated corporations to report its income on a worldwide combined basis. The petitioner in this case, Colgate-Palmolive Company, raises the question in the context of a group of foreign and domestic corporations with a domestic parent (a U.S.-based multinational group). The petitioner in *Barclays* raises the question in the context of a group

of foreign and domestic corporations with a foreign parent (a foreign-based multinational group).

Both *Colgate* and *Barclays* raise several issues in common. Both cases require the Court to determine whether Congress, by remaining silent, may be taken to have consented to the states' use of worldwide combined reporting—a determination that, if affirmative, would obviate any inquiry into the constitutionality of worldwide combined reporting under the negative implications of the Foreign Commerce Clause. If the Court finds that congressional silence does not constitute consent, both *Colgate* and *Barclays* require the Court to determine whether worldwide combined reporting frustrates federal foreign policy in violation of the Foreign Commerce Clause.

Colgate and *Barclays* each, however, raise several issues that are not common to both cases. If the Court finds in *Barclays* that the Foreign Commerce Clause affords a *foreign*-based multinational group protection from a state's requirement of worldwide combined reporting for reasons that do not, by their own force, apply to a *U.S.*-based multinational group, *Colgate* raises two additional issues. First, *Colgate* raises the issue whether foreign policy concerns of "competitive balance" independently compel the conclusion that the Foreign Commerce Clause protects a U.S.-based multinational group from a state's requirement of worldwide combined reporting. Second, even if the Court were to find that Colgate did not have an independent policy-based Foreign Commerce Clause grievance against California's taxing method, *Colgate* raises the issue whether a U.S.-based multinational group engaged in foreign commerce is nonetheless entitled to the same protection that is afforded a foreign-based multinational group engaged in such commerce, to avoid discrimination against one form of foreign commerce in favor of another. *Barclays* also raises issues that are not raised by *Colgate* regarding the administrative burdens that worldwide unitary combination imposes on a foreign-based multinational group.

The underlying facts regarding the questions raised by *Colgate* in its petition were stipulated and are not in dispute.

A. Colgate-Palmolive Company's Business

Colgate-Palmolive Company is a Delaware corporation with its corporate headquarters in New York. During the years in question (1970-73), Colgate-Palmolive Company and its subsidiaries doing business in the United States (hereinafter collectively "Colgate") were engaged principally in the manufacture and distribution of household and personal hygiene products. Colgate's manufacturing and distribution operations extended throughout the United States, including California. In addition to its United States operations, Colgate owned approximately 75 subsidiaries that operated in 53 foreign countries (hereinafter Colgate's "foreign subsidiaries" or "foreign operations"). Joint Stipulation, *Colgate-Palmolive Co. v. Franchise Tax Bd.*, No. 319715 (Cal. Super. Ct.), ¶ 8 (J.A. 5).[2] These foreign subsidiaries, which were likewise engaged in the manufacture and distribution of household and personal hygiene products, operated *exclusively* in foreign countries. They conducted no business in California or in any other state.

B. The Separate Accounting Method

The United States, along with virtually all other nations in the world, uses the "arm's-length" or "separate accounting" method to assign the income of a multinational group of corporations among the different jurisdictions in which it operates.[3] Under this method, the various members of a multinational enterprise are viewed as separate from one another, and the income of any particular member of the group is determined on the basis of the internal accounting records of that member. Affiliates are required to report intercompany transactions on an arm's-length

[2] All subsequent references to the joint stipulation in this case are denominated "Stip." followed by a paragraph reference.

[3] *See* I.R.C. § 482 (1986); *see also* Treas. Reg. § 1.482 (1988).

basis, as if dealing with unrelated entities in the marketplace.

Separate accounting is the method uniformly adopted in tax treaties between the United States and foreign nations, as well as the standard that the United States has adopted in its internal tax laws. *See* income tax treaties cited in *Barclays* J.A. A-26–A-31; *see also* Pet. App. A at 5a. Accordingly, separate accounting is the method by which the United States and foreign countries determined the income of Colgate and its foreign subsidiaries. Testimony of Gerald Gibian, Reporter's Transcript at 311.

C. California's Worldwide Combined Reporting Method of Taxation

In contrast to the arm's-length, separate accounting method employed by the United States and its foreign trading partners, the worldwide combined reporting method employed by California during the years at issue [4]

[4] In response to widespread opposition to its worldwide combined reporting requirement (*see infra* pp. 6-10), California subsequently enacted legislation modifying the requirement that taxpayers file income tax returns on a worldwide combined basis. Specifically, in 1986, California enacted legislation to take effect on January 1, 1988, permitting a corporate taxpayer engaged in a worldwide unitary business to elect to compute its California franchise tax liability generally on the basis of its United States, as opposed to its worldwide, operations. *See* Cal. Rev. & Tax. Code § 25110 (West 1992). Subsequently, in 1993, California enacted Senate Bill 671 (Oct. 6, 1993) which modifies this "water's-edge" election in three principal respects. Cal. S.B. 671, 1993-94 Reg. Sess. (Oct. 6, 1993). First, the legislation removes the fee that corporations were required to pay under pre-existing law if they wished to limit combined reporting of their income to a "water's-edge" group. *Id.* §§ 24, 26. Second, the legislation removes the authority the Franchise Tax Board possessed under certain circumstances to disregard a corporation's water's-edge election and to require it to file on a worldwide combined basis. *Id.* §§ 16, 23. Third, the legislation eliminates the Domestic Disclosure Spreadsheet, which corporations making a water's-edge election were required to file under pre-existing law, and requires instead that certain large corporations file a list of 20 percent-or-more owned

treats as a single enterprise all of the worldwide affiliates of a multinational group that are engaged in a unitary business. The resulting worldwide income is divided between California and the rest of the world on the basis of a three-factor apportionment formula of property, payroll, and sales. During the years at issue, California determined Colgate's California income by this method: Colgate's California property, payroll, and sales were divided, respectively, by the worldwide property, payroll, and sales of Colgate and its foreign subsidiaries; these three fractions were averaged to produce Colgate's California apportionment percentage; and the apportionment percentage was then applied to the worldwide combined taxable income of Colgate and its foreign subsidiaries to produce Colgate's California taxable income. Pet. App. B at 4a-7a.

D. Opposition to California's Worldwide Combined Reporting Method of Taxation

Since its inception, the worldwide combined reporting method of taxation has been the focus of steadily increasing national and international opposition because of its disregard of the established international norm of tax accounting.[5]

On the international front, foreign governments have repeatedly and forcefully protested California's use of the taxing method through both formal and informal diplomatic channels. *See e.g. Barclays* J.A. A-68–A-138. These protestations have included diplomatic notes from virtually every developed country in the world, including the United Kingdom, Japan, Canada, and Belgium. *See, e.g., id.*

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affiliates. *Id.* § 13. Senate Bill 671 applies only to tax years beginning on or after January 1, 1994.

[5] *See, e.g.*, Hearings on Tax Treaties with the United Kingdom, the Republic of Korea, and the Republic of the Philippines Before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. 33 (1977) (statement of Laurence N. Woodworth, former Assistant Secretary of the Treasury (Tax Policy)); Hearing on H.R. 5076 Before the House Comm. on Ways and Means, 96th Cong., 2d Sess. 3, 7 (1980) (statement of David C. Lubick, former Assistant Secretary of the Treasury (Tax Policy)).

Moreover, California's use of worldwide combined reporting has become a material stumbling block in U.S. treaty negotiations. *See, e.g.*, diplomatic note from the British Embassy to the Department of State, Washington, D.C., dated March 25, 1980, regarding the difficulties that states' use of worldwide combined reporting created in the negotiation of the U.S.-U.K. tax treaty (*Barclays* J.A. A-96–A-99). Indeed, the continued use of worldwide combined reporting prompted the United Kingdom in 1985 to enact retaliatory legislation which gives the United Kingdom the authority to deny the shareholders' tax credit (a credit that the United Kingdom gives on dividends paid by U.K. subsidiaries to their U.S. parents) to U.S. parents with a presence in states that use worldwide combined reporting.[6] As a result of Senate Bill 671, recently enacted by California to modify the state's taxation of a multinational group of corporations (*see supra* p. 5, n.4), the United Kingdom withdrew its recent threat to implement the retaliatory legislation; however, it remains statutorily available to the United Kingdom. Colgate would be directly subject to this retaliatory legislation, if it is ever enforced.

On the domestic front, the Federal Government has pursued a policy opposing states' use of worldwide combined reporting, largely because of the impact of that method of taxation upon relations with foreign nations. At least until 1983, however, that policy had not been expressed with great clarity. Accordingly, in 1983, this Court, observing that the Federal Government had not issued an explicit statement indicating that worldwide combined reporting frustrated federal foreign policy, sustained the application of California's taxing method. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194-96 (1983).

Following *Container*, the President of the United States acted to avoid perpetuation of the ambiguity that laid the

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[6] Section 54 and Schedule 13 to the Finance Act of 1985, reenacted as Sections 812-815 of the Income and Corporations Taxes Act, 1988.

predicate for that decision. Specifically, in September 1983, just three months after *Container*, the President formed the Worldwide Unitary Taxation Group, which issued its final report to the President on August 31, 1984. Based on this report, the President issued a statement on November 8, 1985, instructing the Secretary of the Treasury to pursue through legislation, and the Attorney General to pursue in appropriate cases in litigation, the federal policy that multinationals be taxed by states only on income derived from the territory of the United States. *See* Press Statement of President Reagan (November 8, 1985) (J.A. 7-8).

Subsequent to this statement, Secretary of State George Shultz wrote to the Governor of California, George Deukmejian, on January 30, 1986, to explain the foreign policy concerns that prompted the Federal Government's action. Secretary Shultz explained those foreign policy concerns, in part, as follows:

> The United States has advocated and adopted the position that the "arm's-length" adjustment method of allocating income among commonly controlled corporations doing business in various national jurisdictions is the appropriate method to be employed. This view is embodied in the Internal Revenue Code and is a central feature in our bilateral tax treaties. . . . Your state's employment of the worldwide unitary method of tax accounting is at odds with the position of the United States and has become a source of conflict with foreign states.

Letter from Secretary of State George Shultz to George Deukmejian, Governor of California (January 30, 1986) (J.A. 9-10). *See also* letter from Secretary of the Treasury James A. Baker III to Senator Bob Packwood, Chairman of the Senate Finance Committee (March 5, 1986), reiterating the inconsistency of worldwide combined reporting with United States foreign policy (J.A. 13-23).

Moreover, consistent with President Reagan's mandate to the Attorney General to oppose worldwide combined

reporting in appropriate cases in litigation, the Federal Government has issued statements for use in the litigation of this very case. In response to a specific request from Colgate that the Federal Government repeat its position on worldwide combined reporting and make that position explicit in the context of domestic-based multinational groups (*see* J.A. 31-34), the Federal Government declared:

> As a tax policy matter, we are equally opposed to the use of worldwide unitary apportionment to determine the income of domestic-parent multinational corporations and that of foreign-parent multinational corporations.

Letter from Secretary of the Treasury Nicholas Brady to Reuben Mark, Chairman, President, and Chief Executive Officer of Colgate (September 13, 1991) (J.A. 35).

As further evidence of worldwide combined reporting's incompatibility with federal foreign policy, Secretary Brady attached correspondence from the Member States of the European Community to his letter to Colgate's chairman. *See* J.A. 37-42. Moreover, Secretary Brady expressed the Federal Government's view that eliminating worldwide combined reporting as applied to foreign-based taxpayers only was the " 'least desirable of possible alternatives' " (J.A. 35) because such a solution would not " 'satisfy the principle of ensuring competitive balance among similarly situated businesses.' " J.A. 36 (citing testimony of J. Roger Mentz, Assistant Secretary of the Treasury (Tax Policy), before the Subcommittee on Taxation and Debt Management of the Senate Finance Committee, Sept. 29, 1986, p. 3). *See also* letter from J. Roger Mentz, Assistant Secretary of the Treasury (Tax Policy), to George Deukmejian, Governor of California (April 8, 1987) (J.A. 24-27).

Both national and international hostility towards worldwide combined reporting has continued to this day. On October 7, 1993, the U.S. Government expressed its views to this Court that "state use of worldwide combined

reporting was 'at odds with the position of the United States and has become a source of conflict with foreign states.'" S.G. Br. at 4.[7] Moreover, the Solicitor General acknowledged that the "analysis and holdings of the California Supreme Court" upholding worldwide combined reporting "are subject to serious question." *Id.* at 8. Similarly, on September 23, 1993, the Member States of the European Community and the Commission of the European Communities expressed to the U.S. Government "their strong opposition to worldwide unitary taxation." *See* Demarche from the Member States of the European Community and the Commission of the European Communities, dated September 23, 1993, *reprinted in* the Appendix to the Supplemental Brief of Petitioner in this case, filed with the Court on October 18, 1993.

E. The Tax Assessment

Colgate timely filed California franchise tax returns for the tax years 1970 through 1973, reporting the income earned from its foreign operations on a separate accounting basis. Stip. ¶ 2 (J.A. 4). The California Franchise Tax Board determined that Colgate's tax should be computed on the basis of worldwide combined reporting. Colgate paid the additional tax owing under the Franchise Tax Board's method of computation and filed claims for refund, which the Board denied. Stip. ¶ 7 (J.A. 5).

F. The Proceedings Below

1. *Superior Court of California*

In April 1984, Colgate filed suit in the Superior Court of California seeking a refund of franchise taxes paid for tax years 1970-73 on the ground, among others, that the Foreign Commerce Clause precluded California from requiring Colgate to report its income to California on a

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[7] All references to the Solicitor General's *amicus* brief filed in connection with Barclays' petition for certiorari in No. 92-1384 are denominated "S.G. Br." followed by a page reference.

worldwide combined basis. After lengthy discovery, a two-week trial was conducted in July, 1988, at which the parties introduced extensive evidence of the Federal Government's policy towards worldwide combined reporting. In April 1989, the court issued its decision, which concluded that the application of California's requirement of worldwide combined reporting to Colgate and its foreign subsidiaries frustrated United States foreign policy, in violation of the negative implications of the Foreign Commerce Clause.

In reaching its conclusion, the trial court rejected the contention of the Franchise Tax Board that Congress had expressly approved of California's method of taxation, thereby rendering dormant Commerce Clause analysis unnecessary. On the contrary, the court found as a factual matter "that the executive branch of the federal government has clearly expressed a federal policy supporting the principle of water's edge taxation of multinational corporations and disapproving the world-wide unitary method . . . and that the legislative branch has not expressed a contrary policy." Pet. App. F at 97a-98a.

Reviewing the facts under the dormant Foreign Commerce Clause criteria first articulated by this Court in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), the trial court found that California's "method of taxation of multinational corporations impermissibly interferes with the federal government's power to conduct foreign commerce and is thus unconstitutional." Pet. App. F at 98a. Moreover, the court found that federal policy was the same whether the worldwide combined reporting method was applied to U.S.-based multinational groups, such as Colgate, or to foreign-based multinational groups (such as the petitioner in *Barclays*). As the court observed, "[t]he condemnation of the world-wide unitary method applies to all instrumentalities of foreign commerce, not just foreign based corporate groups." Pet. App. F at 90a.

In arriving at its conclusion, the court found that this case differed dramatically in its factual posture from *Container*. In *Container*, this Court addressed the same issue that Colgate raises here—the constitutionality of worldwide combined reporting—but found that there was no evidence of a clear statement by the Federal Government regarding the impact of worldwide combined reporting on federal foreign policy. *Container*, 463 U.S. at 195 n.33. Here, by contrast, the trial court found that the evidence which was lacking in *Container* had been supplied by the Executive Branch and introduced by Colgate. Pet. App. F at 90a. "On this record," the court concluded,

> it is impossible to say that the executive branch of the federal government has not spoken clearly. It is the policy of the United States, speaking through the executive branch, that the water's edge system be followed and the unitary method discarded.

Id. at 91a.

2. *Court of Appeal of California (First Decision)*

In August 1991, the Court of Appeal reversed. The Court of Appeal agreed with the trial court that Congress had not consented to worldwide combined reporting, which therefore required the court to consider the validity of worldwide combined reporting under the dormant Foreign Commerce Clause. The Court of Appeal had already held that the dormant Foreign Commerce Clause prohibited worldwide combined reporting as applied to a foreign-based multinational group in its decision in *Barclays*. *Barclays* Pet. App. at B-2. The court nevertheless held that the Foreign Commerce Clause would not bar worldwide combined reporting as applied to Colgate without a more explicit statement of federal hostility towards worldwide combined reporting in the context of a U.S.-based multinational group. The Court of Appeal justified its conclusion on the basis that the Federal Government had been notified about the case by counsel for Colgate and yet "the executive branch has done nothing here to make its position known" in the case. Pet. App. E at 57a.

3. *Supreme Court of California (First Petition for Review)*

Colgate's petition for review to the Supreme Court of California was based largely on statements by the Executive Branch condemning worldwide combined reporting as applied to Colgate. These statements, some of which were released after the Court of Appeal's decision, were intended to meet that court's objection that previous statements of the Executive Branch regarding its opposition to worldwide combined reporting were not specifically directed to a U.S.-based multinational group. The Supreme Court of California granted Colgate's petition for review in November 1991. Pet. App. D at 28a.

In May 1992, however, before this case was set for argument in the Supreme Court of California, the court issued its decision in *Barclays*. *Barclays* Pet. App. at C-1–C-40. Without reaching the question whether the negative implications of the Foreign Commerce Clause precluded the application of worldwide combined reporting to a foreign-based multinational group, the court found that such an inquiry was obviated by the fact that Congress had consented to California's taxing method. The court did not find this consent in any affirmative congressional action. Rather, the court gleaned such consent from what it referred to as "the din of a 'governmental silence'." *Barclays* Pet. App. at C-26. Relying on *Wardair Canada, Inc. v. Florida Dep't of Rev.*, 477 U.S. 1 (1986), the court held that

> recent foreign commerce clause jurisprudence reflects a diminution in the reach of dormant foreign commerce clause analysis in favor of an expanded recognition that, under circumscribed conditions, governmental silence may constitute a ratification of state taxation of foreign commerce, rendering a dormant analysis inapposite.

Barclays Pet. App. at C-4.

In June 1992, the Supreme Court of California transferred this case back to the Court of Appeal "with directions to vacate its decision and to refile the opinion after modification in light of *Barclays Bank International v. Franchise Tax Board* (1992) 2 Cal. 4th 708, 8 Cal. Rptr. 2d 31, 829 P. 2d 279." Pet. App. C at 27a.

4. *Court of Appeal of California (Second Decision)*

In February 1993, the Court of Appeal issued its second decision in this case—the decision that is before this Court for review. The Court of Appeal recognized that the dormant Foreign Commerce Clause analysis which underlay its initial decision rejecting Colgate's Foreign Commerce Clause claim was inappropriate in light of the California Supreme Court's opinion in *Barclays*. Accordingly, despite its earlier conclusion that Congress had not consented to worldwide unitary combination, Pet. App. E at 43a, the Court of Appeal now felt constrained by the California Supreme Court's opinion to revisit the question of congressional consent. The court observed that "there is no distinction between this case and *Barclays*" (Pet. App. B at 18a) for purposes of determining whether there was congressional consent, since the factors on which the California Supreme Court relied in *Barclays* to find such consent were equally present in this case. *Id.* The Court of Appeal therefore found itself "obligated to adopt the analysis in *Barclays* regarding *Wardair*'s applicability" (*id.*) and held that Congress had consented to the states' application of worldwide combined reporting to domestic-based, as well as to foreign-based, multinational groups.

5. *Supreme Court of California (Second Petition for Review)*

In February 1993, the Supreme Court of California denied Colgate's petition for review of the revised opinion of the Court of Appeal. Pet. App. A at 1a.

SUMMARY OF ARGUMENT

1. When Congress exercises its power under the Commerce Clause to consent to a state law, it eliminates any question of the validity of that law under the dormant Commerce Clause, even if the state law imposes substantial burdens on interstate or foreign commerce. Recognizing the considerable consequences that flow from a finding of congressional consent, this Court has consistently required that Congress manifest its consent to state law under the Commerce Clause through unambiguous affirmative action. *See, e.g., Wyoming v. Oklahoma,* 112 S. Ct. 789, 802 (1992); *Maine v. Taylor,* 477 U.S. 131, 138-39 (1986); *Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 960 (1982).

The California Supreme Court, whose decision in *Barclays* dictated the decision below on the congressional consent issue, ignored this settled body of case law in finding congressional consent to California's use of worldwide combined reporting not in unambiguous affirmative action, but rather in "the din of a 'governmental silence.' " *Barclays* Pet. App. at C-26. In justifying its novel approach to the congressional consent issue, the court relied almost exclusively on this Court's decision in *Wardair,* which, in the state court's view, represented a "retrenchment" in the scope of this Court's dormant Commerce Clause jurisprudence. *Id.* at C-24.

The state court's conclusion that congressional silence can form the basis for congressional consent, however, cannot be squared with *Wardair* or decisions preceding or following it. Indeed, *Wardair* itself found consent on the ground that "the Federal Government has not remained silent" but rather "has affirmatively decided to permit" the state tax there at issue. *Wardair,* 477 U.S. at 12. Moreover, the California court's view that congressional silence can signify consent under the Commerce Clause undermines the free trade purposes of the Clause. If congressional inaction—as well as congressional action—is recognized as a legitimate basis for validating state laws that are

otherwise unconstitutional under the Commerce Clause, then the scope of Commerce Clause protection from burdensome state laws will be severely narrowed, if not eliminated altogether.

Even assuming that congressional inaction could, in some circumstances, lay the foundation for a finding of congressional consent to state law, the inaction of Congress in this case is inconsistent with any plausible view of consent and bears no resemblance to the factual basis that led the Court to find consent in *Wardair*. Whereas the Court in *Wardair* found consent in a series of international agreements that specifically considered the state taxation at issue, the California Supreme Court found consent by implication in a series of congressional inactions. Four of the five congressional inactions involve no mention of the states' use of worldwide combined reporting. The single inaction that even concerns the matter here at issue is a failure to obtain the necessary two-thirds vote to ratify a treaty containing a provision prohibiting the states' use of worldwide combined reporting. A majority of Senators, however, voted to support the provision, negating any inference of consent from the failure to act.

Finally, each of the factors on which the California Supreme Court relied as a basis for congressional consent was before this Court in *Container*. Yet, in *Container*, the Court did not find congressional consent and undertook dormant Commerce Clause analysis when considering the constitutionality of California's taxing method.

2. Under the negative implications of the Foreign Commerce Clause, a state tax cannot survive scrutiny if the tax prevents the Federal Government from " 'speaking with one voice when regulating commercial relations with foreign governments.' " *Japan Line*, 441 U.S. at 451. A state tax will violate the "one voice" standard either if it violates "a clear federal directive" or if it "implicates foreign policy issues that must be left to the Federal Govern-

ment." *Container*, 463 U.S. at 194. California's worldwide combined reporting regime fails both these tests.

The Federal Government has issued a "clear federal directive" in this very case that California's worldwide combined reporting method as applied to Colgate is contrary to United States foreign policy. Executive Branch statements in this case, and in other contexts, unequivocally declare that the United States opposes the use of worldwide combined reporting as applied to a U.S.-based multinational group like Colgate, just as it is opposed to the use of worldwide combined reporting as applied to a foreign-based multinational group like Barclays. The Federal Government has thus provided the evidence of the United States' unmitigated hostility to worldwide combined reporting that was missing at the time the Court decided *Container* and whose absence led the Court to sustain the application of worldwide combined reporting in that case.

The Federal Government's statements likewise make it clear that worldwide combined reporting as applied to a U.S.-based multinational group "implicates foreign policy issues which must be left to the Federal Government." *Id.* Executive Branch statements have expressed the Federal Government's position that the states' use of worldwide combined reporting constitutes an impermissible interference with the conduct of the nation's foreign affairs.

Even if, contrary to Colgate's view, the Court were to find that worldwide combined reporting is invalid as applied to foreign-based multinationals in *Barclays* for reasons that do not, by their own force, apply to U.S.-based multinational groups, there are two additional reasons why California is nonetheless precluded from requiring Colgate to report on a worldwide combined basis. Foreign policy considerations of "competitive balance" independently compel the conclusion that the Foreign Commerce Clause protects a U.S.-based multinational group from worldwide combined reporting. The Federal Gov-

ernment has consistently embraced the view that the maintenance of competitive balance for domestic corporations vis-a-vis foreign corporations is a central tenet of United States foreign policy. Permitting California to apply worldwide combined reporting to U.S.-based multinational groups but not to foreign-based multinational groups would violate that policy.

Basic principles of Commerce Clause analysis similarly require that a U.S.-based multinational group like Colgate be accorded the same treatment accorded foreign-based multinationals, wholly apart from foreign-policy concerns of "competitive balance." The Commerce Clause forbids the states from preferring one form of protected commerce over another. *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318 (1977). If California were permitted to apply worldwide combined reporting to a U.S.-based multinational group like Colgate, which is engaged in foreign commerce, but not to a foreign-based multinational group like Barclays, which is likewise engaged in foreign commerce, the resulting preference for foreign-based multinational groups would tilt the level playing field against one form of foreign commerce and frustrate the free trade considerations underlying the Commerce Clause.

ARGUMENT

I. CONGRESS HAS NOT CONSENTED TO CALIFORNIA'S USE OF WORLDWIDE COMBINED REPORTING

The decision of the court below that Congress has consented to worldwide combined reporting—a decision contrary to the court's initial view of this question (*see* Pet. App. E at 43a)—was compelled by the California Supreme Court's opinion in *Barclays.* Indeed, had the court below not felt "obligated" (Pet. App. B at 18a) to follow *Barclays,* it would no doubt have adhered to its opinion that one cannot "presume that Congress has affirmatively stated its position through silence" (Pet. App. E at 45a) and therefore that Congress had not consented to worldwide combined reporting. As we demonstrate below, there is no basis in law or policy for the California Supreme Court's novel approach to the question of congressional consent, nor is there a basis, under any plausible standard, for that court's conclusion that Congress has consented to worldwide combined reporting.

A. In Recognizing Congress' Power to Consent to State Laws That Would Otherwise Be Unconstitutional Under the Dormant Commerce Clause, This Court Has Equated Consent with Unambiguous Affirmative Congressional Action

The appropriate standard for determining when Congress has consented to state law under the Commerce Clause is grounded in the underlying principle that accords congressional consent its crucial constitutional function in this domain. The principle was first articulated a century ago in *In re Rahrer,* 140 U.S. 545 (1891), and given its definitive modern exposition in *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408 (1946).

In *Prudential,* the Court considered a challenge under the negative implications of the Commerce Clause to a South Carolina tax on insurance companies that allegedly discriminated against interstate commerce. Congress had

provided in the McCarran Act, however, that "taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the . . . taxation of such business. . . ." 15 U.S.C. § 1011 (1988). In addressing the question whether its dormant Commerce Clause cases had any bearing on the taxpayer's claim, the Court first observed that "[t]hose cases . . . presented no question of the validity of such a tax where Congress had taken *affirmative action* consenting to it. . . ." *Prudential,* 328 U.S. at 421 (emphasis supplied).

Because the taxpayer argued that the Commerce Clause, by its own force, nevertheless limited "Congress' permissible action in this respect" (*Prudential,* 328 U.S. at 422), the Court proceeded to address the merits of the question. The Court put the question this way: "[I]f the commerce clause, 'by its own force' forbids discriminatory state taxation, or other measures, how is it that Congress *by expressly consenting* can give that action validity?" *Id.* at 426 (emphasis supplied). The answer was easy. When Congress has acted under its commerce power, whether to preempt or to consent to a state law, any question of the validity of the state law under the dormant Commerce Clause disappears. Indeed, "whenever Congress' judgment has been *uttered affirmatively* to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' *expressed approval.*" *Id.* at 425 (emphasis supplied). Since Congress in the McCarran Act had "*expressly stated* its intent and policy" (*id.* at 427) (emphasis supplied) regarding the states' freedom to tax the insurance industry, the Court was "not required to determine whether South Carolina's tax would be valid in the dormancy of Congress' power." *Id.*

The requirement that Congress' consent to state laws under the Commerce Clause be reflected in Congress'

affirmative action is necessitated by the profound consequences of finding such consent. As the Court noted in *Prudential,* because Congress has plenary power over the channels of interstate commerce, "Congress may keep the way open, confine it broadly or closely, or close it entirely" (*Prudential,* 328 U.S. at 434), subject only to the limitations that the Constitution imposes on Congress' own power. This includes, of course, the power to authorize state laws that discriminate against or otherwise burden interstate commerce, laws that would be struck down in the absence of congressional action consenting to them. *Id.* By clearly indicating that congressional consent was a function of affirmative action by Congress, the Court in *Prudential* protected the values underlying the Commerce Clause from erosion through findings of implied congressional consent, recognizing that to expose interstate or foreign commerce to burdensome state legislation without the clearest signal from Congress would undermine our constitutional scheme. "Absent 'a clear expression of approval by Congress,' any relaxation in the restrictions on state power otherwise imposed by the Commerce Clause unacceptably increases 'the risk that unrepresented interests will be adversely affected by restraints on commerce.' " *Maine v. Taylor,* 477 U.S. at 139.

Because Congress' consent to state law under the Commerce Clause completely removes that law from judicial scrutiny under the negative Commerce Clause, the Court, faithful to the teachings of *Prudential,* has properly insisted that Congress manifest its consent to state law through unambiguous affirmative action. Thus, the Court has repeatedly stressed that "[a]n unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation" and to provide an "exemption from Commerce Clause scrutiny." *Maine v. Taylor,* 477 U.S. at 139; *see also Wyoming v. Oklahoma,* 112 S. Ct. at 802 ("Congress must manifest its unambiguous intent before a federal statute will be read to permit or approve . . . a violation of the Commerce Clause"); *South-Central Timber Dev.,*

Inc. v. Wunnicke, 467 U.S. 82, 91-92 (1984) (rejecting " 'implicit approval' theory" of congressional consent and reaffirming "[a] rule requiring a clear expression of approval by Congress"); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. at 960 ("[i]n the instances in which we have found such [congressional] consent, Congress' 'intent and policy' to sustain state legislation from attack under the Commerce Clause" was " 'expressly stated' "); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982) ("when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, . . . we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind' ").

B. The California Supreme Court's Novel Approach to Ascertaining Congressional Consent Under the Commerce Clause Is Irreconcilable with the Decisions of This Court

Despite the large and settled body of case law bearing on congressional consent to state law under the Commerce Clause, the California Supreme Court virtually ignored it in holding that congressional consent could be found in "a species of governmental *silence* that forecloses resort to a dormant foreign commerce clause analysis." *Barclays* Pet. App. at C-21 (emphasis in original). Indeed, the lower court's view rests entirely on its misreading of one case—*Wardair*, 477 U.S. 1. *Wardair* involved the imposition of a Florida sales tax on aviation fuel purchased in Florida by a foreign air carrier for use in international flights. The carrier challenged the tax on two theories: first, it was preempted by federal legislation; second, it was barred by the dormant Commerce Clause.

The Court rejected the preemption argument on the ground that Congress had expressly permitted the states to impose "sales or use taxes on the sale of goods or services" (Federal Aviation Act of 1958, § 1113(b), 49 U.S.C. App. § 1513), which included airline fuel. *Wardair*,

477 U.S. at 6-7. Such an affirmative statement by Congress might itself have been deemed sufficient to constitute consent to the state law, thereby precluding any further inquiry into the matter under the negative implications of the Commerce Clause. The Court nevertheless felt compelled to go further in responding to the taxpayer's dormant Commerce Clause argument because the Court felt Congress may not have expressly considered the imposition of such taxes on *foreign* air carriers in enacting Section 1113 of the Federal Aviation Act, even though that section did not by its terms distinguish between foreign and domestic carriers. *Wardair*, 477 U.S. at 7. Thus, consistent with its precedents addressing congressional consent to state law (*see supra* pp. 21-22), the Court adopted an extremely high standard for finding express approval of a state tax, requiring a clear indication that Congress had intentionally taken legislative action manifesting consent to the tax.

In finding unambiguous affirmative congressional action, the Court relied on a series of international agreements which "demonstrate that the Federal Government has *affirmatively acted*, rather than remained silent, with respect to the power of the States to tax aviation fuel." *Wardair*, 477 U.S. at 9 (emphasis supplied). What the international agreements made "abundantly clear" (*id.* at 12) to the Court was that "the Federal Government *has not remained silent* with regard to the question whether the States should have the power to impose taxes on aviation fuel used by foreign carriers in international travel." *Id.* (emphasis supplied). Because the "Federal Government has *affirmatively decided* to permit the States to impose these sales taxes on aviation fuel" (*id.* (emphasis supplied)), and because "it would turn dormant Commerce Clause analysis upside down to apply it where the *Federal Government has acted*" (*id.* (emphasis supplied)), the Court concluded that Congress had consented to the Florida tax and there was no need to consider its validity under the dormant Commerce Clause.

Despite the Court's unequivocal holding in *Wardair* that affirmative congressional action is the touchstone of congressional consent to state law under the Commerce Clause, the California Supreme Court nevertheless found that Congress had consented to California's worldwide combined reporting scheme based on congressional silence and inaction. *See infra* pp. 27-31. The court justified its departure from this Court's precedents on the ground that *Wardair* itself "represents, if not a change of course in the high court's dormant foreign commerce clause jurisprudence, at least a retrenchment in its scope." *Barclays* Pet. App. at C-24. According to the California court, *Wardair* "can be abstracted into a kind of protocol for identifying those kinds of governmental silences that give rise to 'negative implications' supporting an inference of federal acquiescence in the state tax under challenge." *Id.* at C-23. The court read *Wardair* as "establish[ing] an interpretive framework for educing from a compilation of legislative materials a species of governmental *silence* that forecloses resort to a dormant foreign commerce clause analysis." *Id.* at C-21 (emphasis in original).

The California Supreme Court's frontal assault on this Court's criteria for determining when Congress has consented to state law under the Commerce Clause is indefensible. First, as explained above, there is no justification either in constitutional policy or in this Court's precedents for the extraordinary suggestion of the California Supreme Court that Congress' silence constitutes consent under the Commerce Clause. *See supra* pp. 19-22.

Second, even if there are some suggestions in *Wardair* that the "negative implications" (477 U.S. at 10, 12) of affirmative congressional *action* can lay the evidentiary predicate for a finding of congressional consent to state law, these suggestions do not license a state court to base a finding of consent on the negative implications of *inaction*, which is what the California court did here. *See infra* pp. 25-31. The Court in *Wardair* explicitly declared that it was drawing negative inferences from governmental

action—not governmental omission—in finding that Congress had affirmatively consented to the state tax at issue.

Third, the suggestion that *Wardair* "represents, if not a change of course in the high court's dormant foreign commerce clause jurisprudence, at least a retrenchment in its scope" (*Barclays* Pet. App. at C-24) is unfounded. *Wardair* is cut from the same cloth as the Court's earlier decisions involving congressional consent (*see supra* 19-22), as well as its later decisions. *Id.* Indeed, the claim that there has been a "retrenchment" in the Court's Foreign Commerce Clause jurisprudence is belied by the Court's most recent decision in this domain. *See Kraft Gen. Foods, Inc. v. Iowa Dep't of Rev. and Finance*, 112 S. Ct. 2365 (1992) (invalidating Iowa's income tax scheme under established dormant Commerce Clause principles developed prior to *Wardair*).

Finally, the California court's decision frustrates the free trade purposes underlying the Commerce Clause. According to the California court's analysis, "silence" becomes a basis for inferring consent to state law under the Commerce Clause. Yet it is this very "silence" that has for two centuries been the basis for the Court's dormant Commerce Clause jurisprudence. If congressional silence can justify a finding of congressional consent to state laws, then there may well be no room for the dormant Commerce Clause to operate at all. At a minimum, its scope may be substantially narrowed, and courts will have to distinguish between the kinds of "silence" that warrant a dormant Commerce Clause inquiry and those that preclude judicial scrutiny of state law altogether.

C. Even Assuming That Congressional Consent Can, in Some Circumstances, Be Inferred from Congress' Silence, No Such Inference Could Be Drawn in This Case Without Rendering the Concept of Congressional Consent Meaningless

Even assuming that Congress' silence could, in some circumstances, lay the evidentiary foundation for a finding of congressional consent to state law under the Com-

merce Clause, the inaction of Congress in this case is inconsistent with any plausible view of consent and is a far cry from the facts that lay the foundation for finding congressional consent in *Wardair*.

The Court in *Wardair* found recourse to dormant Commerce Clause analysis unnecessary because Congress had "affirmatively acted, rather than remained silent, with respect to the power of the States to tax aviation fuel." *Wardair*, 477 U.S. at 9; *see supra* p. 23. The Court found this affirmative action in three sources: (1) the Chicago Convention on International Civil Aviation entered into by the United States on December 7, 1944; (2) a Resolution adopted November 14, 1966, by the International Civil Aviation Organization, of which the United States is a member; and (3) bilateral agreements concluded between the United States and various foreign countries.

The Chicago Convention specifically considered subnational taxation of aviation fuel and prohibited local taxes on fuel only when the fuel was "on board an aircraft . . . on arrival . . . and retained on board on leaving." Consistent with well-settled principles of statutory construction, *see* 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.23 (5th ed. 1992), this Court found that, by directly addressing the question of state taxation of aviation fuel and specifying which taxes could not be imposed, the Federal Government was thereby consenting to the imposition of other state taxes, including the state tax at issue in that case. *Wardair*, 477 U.S. at 10.

With respect to the 1966 Resolution, on the other hand, even though it endorsed an international scheme to exempt fuel "from all customs and other duties," the Court found that this endorsement did not negate the congressional policy reflected in the 1944 Chicago Convention. The Resolution was found not to be action by the government of the United States but merely the work product of an organization to which the United States belonged.

The Convention established the context within which the Court considered the subsequent bilateral aviation agreements with foreign countries. In light of the Convention and the Resolution, both of which specifically addressed the concern of subnational taxation, the Court found that the express language of the bilateral agreements precluding only national taxes on aviation fuel reflected a conscious decision by the Federal Government to allow the state taxes at issue in the case. The Court therefore concluded that "the Federal Government has affirmatively decided to permit the States to impose these sales taxes on aviation fuel" (*Wardair*, 477 U.S. at 12) and that dormant Commerce Clause analysis was inappropriate.

The affirmative action found to establish consent in *Wardair* stands in stark contrast to the five items of inaction relied on by the California Supreme Court to support the proposition that Congress has consented to states' use of worldwide combined reporting. These five items of inaction were:

1. Failure to consider state taxes in any income tax treaties with foreign nations, except in nondiscrimination clauses;
2. The absence of any provision restricting state taxes of any sort in various model income tax treaties;
3. The absence of restrictions on state taxation in Friendship, Commerce & Navigation ("FCN") treaties to which the United States is a party;
4. The absence of enacted congressional legislation prohibiting or restricting worldwide combined reporting; and
5. Failure to obtain the necessary two-thirds vote to ratify a treaty containing a provision prohibiting use of worldwide combined reporting by the states.

The first three factors relied on by the California Supreme Court neither directly address nor, indeed, even

consider the question of worldwide combined reporting at the subnational level. The treaties, while requiring use of separate accounting at the national level, are silent on the issue of separate accounting at the state level. Yet the California Supreme Court found that "an extensive pattern of executive branch-negotiated diplomatic texts parallels, in our view, Congress's own unwillingness to disallow legislatively the states' application of formula apportionment methods to foreign-controlled multinational taxpayers, and bespeaks a coordinate 'acquiescence'." (*Barclays* Pet. App. at C-34.)

Such a suggestion is absurd. If congressional consent is to retain any meaning, it cannot be held that an expression of a federal preference for one method of taxation (separate accounting) constitutes congressional consent to states' use of another method of taxation (worldwide combined reporting). Indeed, under the California court's analysis, any treaty that regulated federal taxation at the national level, or failed to consider a particular state taxation method, would reflect a conscious congressional decision to allow states to tax in any manner they please. Such a result would render dormant Commerce Clause analysis obsolete. If the Senate ratified a treaty that included a provision specifically prohibiting or permitting a state taxation method, clearly dormant Commerce Clause analysis would be irrelevant; yet, under the California Supreme Court's approach, if that same treaty were silent on the issue of state taxation, that silence would reflect affirmative approval of and consent to any particular taxing method used by the states, thereby also rendering dormant Commerce Clause analysis irrelevant.

The California Supreme Court's finding that these treaties "parallel[] the *Wardair* paradigm" (*Barclays* Pet. App. at C-34) is also inapt. The treaties at issue in this case are vastly different from the bilateral agreements at issue in *Wardair*. In *Wardair*, the specific subject matter encompassing the tax at issue had been addressed in both the Chicago Convention and the Resolution. The subsequent bilateral agreements were therefore entered into in

the context of these foundational documents. The absence of reference to state taxation reflected a congressional policy to leave unchanged the state tax boundaries established by those earlier documents. In contrast, the treaties and other bilateral agreements at issue in this case did not emanate from any congressional understanding on the subject of state taxation of the income of multinational corporations. Rather these treaties were negotiated and entered into in the context of congressional silence on the subject of state taxation of multinationals and therefore no congressional intent can be attributed to the absence of state taxation regulation.

The California Supreme Court asserted that the tax treaties' nondiscrimination clauses applicable to the states demonstrate that state taxation was in fact at issue in these treaties. Again, however, it is hard to see how a general provision precluding states from taxing foreign corporations at a higher rate than domestic corporations implicates the question of states' use of worldwide combined reporting so that the failure to consider that issue in these treaties can be deemed to reflect congressional policy. Moreover, this general reference to state taxation stands in stark contrast to the specific congressional consideration of the particular subnational tax at issue in the Chicago Convention. Surely, if congressional consent is to have any substantive meaning, then a general nondiscrimination provision cannot give rise to a *Wardair* "negative implication."

A similar analysis applies to the claim that the absence of enacted congressional legislation prohibiting worldwide combined reporting reflects Congress' consent to states' use of that method. Failure to enact legislation is clearly not "affirmative action" of the kind that can be considered in any *Wardair*-type analysis.

The only factor that specifically addresses the application of worldwide combined reporting to foreign-based enterprises is the last factor considered by the California Supreme Court. However, this factor provides no more

insight into congressional policy than the prior four. In 1975, the Executive Branch negotiated an income tax treaty [8] with the United Kingdom that contained a provision, article 9(4), which would have prohibited the states' application of worldwide combined reporting to U.K.-based groups. *Barclays* J.A. A-455. Senator Frank Church introduced a "reservation" to article 9(4) in the Senate Foreign Relations Committee which would have effectively removed article 9(4) from the treaty. This Church reservation was defeated 10 to 5 in the Senate Foreign Relations Committee. The reservation was then voted upon on the Senate floor, and, again, defeated 44 to 34. The treaty with article 9(4) included received a favorable vote of 49 to 32, falling only 5 votes short of the required two-thirds vote necessary for ratification of a treaty. Finally, article 9(4) was reserved without a vote and the treaty was ratified with the reservation.

It is from these three majority votes in favor of *prohibiting* states' use of worldwide combined reporting that the California Supreme Court found a congressional policy *permitting* states' use of worldwide combined reporting. Ignoring the majority votes in favor of article 9(4), the California Supreme Court focused its attention on the failure to achieve the two-thirds majority necessary to ratify the treaty with article 9(4) included. It is always dangerous to speculate on the meaning of congressional inaction, as demonstrated by the fact that the congressional debate over article 9(4) focused not on the merits of worldwide combined reporting but rather on the concern of the Senate that the treaty ratification process was not the appropriate forum in which to consider such a curb on states' powers. The more appropriate forum was Congress.[9] Ironically, the *senatorial* failure to ratify the

[8] Convention for the Avoidance of Double Taxation, Dec. 31, 1975, U.S.-U.K., 31 U.S.T. 5668, T.I.A.S. 9682 (entered into force Apr. 25, 1980).

[9] *See* 124 Cong. Rec. 18,669 (1978) (remarks of Sen. Matsunaga); *see also* 124 Cong. Rec. 18,416-17 (1978) (remarks of Sen. Church).

treaty is the "action" that the California Supreme Court points to as most clearly showing *congressional* consent to states' use of worldwide combined reporting. Yet in the view of the Senators at least, Congress had not even considered, let alone approved of, worldwide combined reporting.

It is not surprising, therefore, that the California Supreme Court, when reviewing the five factors considered above, heard "the din of a 'governmental silence'." *Barclays* Pet. App. at C-26.[10] What is surprising is that the court found it was a din "that cannot be ignored." *Id.* at C-26.

This Court has, however, found that the five "inactions" could, and should, be ignored. Each of the five items alleged here as indications of congressional consent to use of the worldwide unitary method of taxation existed *prior to* this Court's decision in *Container*. The *Container* decision refers to the income tax treaties in general, the model treaties, the failure of Congress to take action, and the reservation with respect to the U.K. treaty. *See* 463 U.S. at 196-97. The FCN treaties were discussed in the Franchise Tax Board's brief in *Container*, but were not mentioned in the *Container* opinion. Brief for Appellee at 126-29, *Container*. Yet this Court did not find that Congress had consented to the worldwide unitary method of taxation, but rather that dormant Commerce Clause analysis was appropriate. There have been no indications of congressional consent to California's use of worldwide combined reporting that should lead this Court to draw a different conclusion.

[10] "Din" is defined in *Webster's Third New International Dictionary* (1976) as "a loud noise; *esp*: a welter of confused or discordant sounds." *Id.* at 635.

II. WORLDWIDE COMBINED REPORTING AS APPLIED TO A U.S.-BASED MULTINATIONAL GROUP FRUSTRATES FEDERAL FOREIGN POLICY IN VIOLATION OF THE FOREIGN COMMERCE CLAUSE

Once the error of the decision below on the congressional consent issue is corrected, the relevant question becomes: Can worldwide combined reporting as applied to a U.S.-based multinational group survive scrutiny under the negative implications of the Foreign Commerce Clause? There are three reasons why the answer to that question is "no." First, worldwide combined reporting prevents the Federal Government from "speaking with one voice"—a voice that in recent years has clearly articulated its staunch opposition to worldwide combination for foreign-based and U.S.-based multinational groups alike. Second, if worldwide combined reporting is unconstitutional as to foreign-based multinational groups, then foreign policy concerns of "competitive balance" dictate that worldwide combination be found unconstitutional as to U.S.-based multinational groups as well. Third, wholly apart from a foreign policy-based objection to treating foreign-based and U.S.-based multinational groups differently, the Foreign Commerce Clause guarantees U.S.-based multinational groups engaged in foreign commerce the right to treatment equal to that of foreign-based multinational groups engaged in foreign commerce.

A. Worldwide Combined Reporting as Applied to a U.S.-Based Multinational Group Prevents the Federal Government from "Speaking with One Voice"

A state tax cannot survive scrutiny under the Foreign Commerce Clause if the tax would "impair federal uniformity in an area where federal uniformity is essential," *Japan Line*, 441 U.S. at 448, or prevent "the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Id.* at 451 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)). In *Container*, this Court established

that a state tax will violate the "one voice" standard if the tax "*either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." *Container*, 463 U.S. at 194 (emphasis in original).

1. *Worldwide Combined Reporting as Applied to a U.S.-Based Multinational Group Violates "a Clear Federal Directive"*

Under the "clear federal directive" standard, California's worldwide combined reporting regime must be struck down in its application to U.S.-based multinational groups if the Federal Government has clearly expressed its opposition to such a regime in the context of foreign policy concerns.

In *Container* itself, of course, the Court sustained the application of California's worldwide combined reporting requirement as applied to a U.S.-based multinational group precisely because, at that time, there was no clear statement by the Executive Branch regarding the impact of California's method of taxation on federal foreign policy. As the Court explained in *Container*, the mixed signals sent by the Executive Branch prevented the Court from ascertaining the position of the Executive Branch on California's taxing method:

> The Solicitor General did submit a memorandum opposing worldwide formula apportionment by a State in *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*, No. 81-349, a case that was argued last Term, and carried over to this Term. Although there is no need for us to speculate as to the reasons for the Solicitor General's decision not to submit a similar memorandum or brief in this case . . . there has been no indication that the position taken by the Government in *Chicago Bridge & Iron Co.* still represents its views, or that we should regard the brief in that case as applying to this case.

Container, 463 U.S. at 195 n.33. The Court thus indicated its reluctance to find that California's method of

taxation impermissibly interfered with federal foreign policy in the absence of an unambiguous statement of the Federal Government's position.

More recently, the Court distinguished the worldwide combined reporting method of taxation which it upheld in *Container* from the ad valorem tax it struck down in *Japan Line* on the ground that " 'in [*Container Corp.*], unlike *Japan Line*, the Executive Branch ha[d] decided not to file an *amicus curiae* brief in opposition to the state tax.' " *Itel Containers Int'l Corp. v. Huddleston*, 113 S. Ct. 1095, 1103 (1993) (quoting *Container*, 463 U.S. at 195). Accordingly, the Court concluded that "the Government's nonintervention suggested that the tax presented no serious threat to United States foreign policy." *Itel*, 113 S. Ct. at 1104.

a. ***The Federal Government Has Issued a Clear Federal Directive Opposing Worldwide Combined Reporting in This Case***

The missing evidence of the Executive Branch's opposition to worldwide combined reporting, which was crucial to the Court's decision in *Container*, has been supplied in this case. In response to a specific request from Colgate that the Federal Government reaffirm its opposition to worldwide combined reporting and make that opposition explicit beyond doubt in the context of U.S.-based multinational groups, the Federal Government issued the following statement:

> As a tax policy matter, we are equally opposed to the use of worldwide unitary apportionment to determine the income of domestic-parent multinational corporations and that of foreign-parent multinational corporations.

Letter from Secretary of the Treasury Nicholas Brady to Reuben Mark, Chairman, President, and Chief Executive Officer of Colgate (September 13, 1991) (J.A. 35).[11]

[11] This Court has frequently recognized Executive Branch letters as evidence of the policy of the Federal Government. *See, e.g., Zschernig v. Miller*, 389 U.S. 429 (1968).

Secretary Brady's letter is not the first Federal Government statement referring to this very case in condemning worldwide combined reporting. The correspondence attached to the letter from Secretary Brady reveals that, unbeknownst to the court below or to Colgate, the federal policy against worldwide combined reporting had been reiterated in connection with this very case, while the case was pending before the Court of Appeal. On May 9, 1989, Governor Deukmejian wrote to Secretary Brady objecting to the involvement of the Federal Government in both *Barclays* and *Colgate* and requesting that the Federal Government cease "further involvement in these state tax matters." Letter from George Deukmejian, Governor of California, to Secretary of the Treasury Nicholas Brady (May 9, 1989) (J.A. 47). Governor Deukmejian's letter reflected the view of the State of California at that time that the prior statements of the Federal Government demonstrated its opposition to worldwide combined reporting as applied to both U.S.-based and foreign-based multinational groups. Moreover, in his reply to Governor Deukmejian, Secretary Brady specifically refused to cease further involvement in the "cases contesting California's use of worldwide unitary apportionment." Letter from Secretary of the Treasury Nicholas Brady to George Deukmejian, Governor of California (August 3, 1989) (J.A. 43).

The Federal Government subsequently went even further to explicate its position in this very case by explicitly adopting the views expressed in Colgate's petition for review of the first decision of the Court of Appeal (*see supra* p. 13), filed with the California Supreme Court on September 30, 1991. In explaining that it was unnecessary for the Federal Government to produce yet another document reaffirming its opposition to worldwide combination as applied to a U.S.-based multinational group, the Federal Government declared:

> Colgate-Palmolive filed a Petition for Review in the Supreme Court of California on September 30, 1991. This Petition makes very effective use of

> Treasury's opposition to the use of worldwide unitary tax by the states, as expressed in Secretary Brady's letter of September 13 to Mr. Reuben Mark. Therefore, the Supreme Court of California is now well aware of our position, which has been clear and consistent. We see no reason at this point to submit a brief that would merely repeat the arguments made in the Petition.

Letter from Assistant Secretary of the Treasury Kenneth W. Gideon to Jerry J. Jasinowski, President, National Association of Manufacturers (received November 1, 1991) (J.A. 50-51).

From the foregoing statements emanating from the Federal Government and directed to this very case, the conclusion is inescapable that California's worldwide combined reporting requirement as applied to Colgate violates "a clear federal directive" and must be struck down under the "one voice" standard of the Foreign Commerce Clause.

b. *The Directive in This Case Elaborates on Prior Executive Statements Condemning the Application of Worldwide Combined Reporting to All Multinational Groups*

The Executive Branch statements directed to this case do not, by any means, reflect a new policy of the Federal Government. In fact, these statements simply elaborate on earlier Executive Branch statements that clearly condemn the application of worldwide combined reporting to all multinational groups.

The most important of these is President Reagan's statement of November 8, 1985. J.A. 7-8. Following the Court's decision in *Container*, the President mobilized the Executive Branch to act decisively to avoid perpetuation of the uncertainty regarding federal policy that resulted in the Court's decision. Specifically, President Reagan issued a statement instructing the Secretary of the Treasury to pursue through legislation, and the Attorney General to pursue through litigation, the federal policy "that multinationals be taxed by states only on income

derived from the territory of the United States." *Id.* at 7. This statement—which applies to U.S.-based and foreign-based multinationals alike—plainly demonstrates that worldwide combined reporting is inconsistent with federal policy.

Later statements emanating from the Federal Government reinforce the presidential declaration that California's worldwide combined reporting regime contravenes federal foreign policy. On January 30, 1986, Secretary of State Shultz wrote to Governor Deukmejian to inform him of the proposed federal legislation prohibiting worldwide combined reporting and to explain the foreign policy concerns that prompted the Federal Government's action. In that letter, Secretary Shultz pointedly observed that California's "employment of the worldwide unitary method of tax accounting is at odds with the position of the United States and has become a source of conflict with foreign states." J.A. 10. Again, the federal directive opposing worldwide combined reporting draws no distinction between U.S.-based and foreign-based multinationals.

Similar sentiments were subsequently expressed by Secretary of the Treasury James Baker in a letter to Senator Bob Packwood, Chairman of the Senate Finance Committee, condemning worldwide combined reporting in its application to U.S.-based multinational groups (J.A. 13-23); by a Department of Justice *amicus* brief in a case involving *Barclays*, expressing the Federal Government's opposition to worldwide combined reporting (*Barclays* J.A. A-1); and by two statements by Deputy Attorneys General that the views in that *amicus* brief remained unchanged at the time of the trial in this case (J.A. 28-30).

In short, the Federal Government's opposition to worldwide combined reporting as applied to U.S.-based multinational groups reflects long-standing federal policy that was explicitly articulated in response to this Court's opinion in *Container*. Although the Court in *Container* was unable to discern the Federal Government's position on the basis of the evidence then available, a decade of

unequivocal federal directives has made the Federal Government's position clear. In light of the Federal Government's unambiguous hostility to worldwide combined reporting, California's method of taxing multinational groups—U.S.-based as well as foreign-based—cannot survive Foreign Commerce Clause scrutiny because it violates "a clear federal directive."

c. ***Neither the Last-Minute Revisions to California's Worldwide Combined Reporting Regime nor the Recent Submission by the Solicitor General in*** Barclays ***Are an Antidote to Colgate's Foreign Commerce Clause Objections in This Case***

As noted above (*see supra* p. 5, n.4), California has enacted legislation prospectively modifying its worldwide unitary reporting regime in response to the widespread opposition that this regime has engendered. In opposing the grant of certiorari in *Barclays*, the Solicitor General cited these legislative changes as the basis for his conclusion that "[a] decision by this Court on the constitutional question posed in this case is . . . unnecessary to achieve adequate consistency in the Nation's regulation of foreign commerce, which California has striven to accomplish through its voluntary action." S.G. Br. at 10. As we demonstrate below, however, neither the recent California legislation nor the views of the Solicitor General undermine Colgate's Foreign Commerce Clause claim in this case.

First, there is nothing in the recent California legislation that has any effect whatsoever on California's efforts to require Colgate—or thousands of other similarly situated taxpayers—to report on a worldwide combined basis for years prior to the effective date of the legislation. Approximately $1.2 billion in refund claims and $1.9 billion in assessments rest upon the outcome of this case alone, with an additional $500 million in refunds and $350 million in assessments resting upon the outcome in *Barclays*. *See* Report, Senate Rev. & Tax. Comm., S.B.

671 (Alquist), 1993-94 Reg. Sess., August 16, 1993. Accordingly, the constitutional harm that worldwide combined reporting has visited upon Colgate and Barclays remains unmitigated despite California's last-minute legislative attempt to dissuade the Court from considering the merits of *Barclays* and *Colgate*.

Second, the Solicitor General's most recent submission to this Court explicitly recognizes the critical fact that underlies Colgate's claim in this case, namely, that states' use of worldwide combined reporting has long been " 'at odds with the position of the United States and has become a source of conflict with foreign states.' " S.G. Br. at 4 (quoting *Barclays* Pet. App. at H-44). Indeed, the Solicitor General recognizes that California's method of taxation, even after the changes in the law in 1986, is fundamentally inconsistent with federal foreign policy and continues to be an irritant in relations with foreign governments. S.G. Br. at 9.

Third, although the Solicitor General contends that there now has been an "accommodation of state, national, and international interests" (S.G. Br. at 10) on the issue of worldwide unitary combination, the Solicitor General's views ignore the *continuing* foreign opposition to California's taxing regime as well as the *continuing* frustration of United States foreign policy caused by California's aggressive enforcement of preexisting tax liabilities based on worldwide unitary combination. Thus, in an official Demarche, issued *after* the California legislature had passed the recent legislation modifying its worldwide combined reporting requirement, the Member States of the European Community and the Commission of the European Communities notified the United States Government that they "do not consider that the unitary tax problem is solved." *See* Petitioner's Supplemental Brief on Petition for a Writ of Certiorari, App. A at 2a.[12] Moreover, noth-

[12] Indeed, the Solicitor General himself acknowledges that any view as to whether the new California legislation is consonant with

ing the Solicitor General has said changes the fact that *existing* United States foreign policy remains unalterably opposed to states' use of worldwide unitary combination. California's ongoing efforts to apply worldwide combined reporting to Colgate and other taxpayers fly in the face of this longstanding policy.

2. *Worldwide Combined Reporting as Applied to a U.S.-Based Multinational Group "Implicates Foreign Policy Issues Which Must Be Left to the Federal Government"*

As noted above, a state tax will violate the "one voice" standard if the tax "*either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." *Container*, 463 U.S. at 194 (emphasis in original). The evidence described above which demonstrates that worldwide combined reporting as applied to a U.S.-based multinational group "violates a clear federal directive" (*see supra* pp. 33-38) likewise demonstrates that worldwide combined reporting "implicates foreign policy issues which must be left to the Federal Government."

Secretary Brady's letter of September 13, 1991, and the attachments thereto (J.A. 35-47; *see supra* p. 9) make it clear that worldwide combined reporting as applied to U.S.-based multinational groups implicates foreign policy issues. The letter is written on behalf of, among others, the Secretary of State and the U.S. Trade Representative, Executive Branch officers whose primary concern is foreign policy. Moreover, the letter and the attachments were transmitted specifically for use in this litigation and therefore pertain in the Federal Government's eyes to the propriety of worldwide combined reporting as applied to U.S.-based multinational groups.

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federal foreign policy is no more than speculation. His brief recognizes that issues "might hereafter arise in connection with enforcement of the State's new legislation." S.G. Br. at 10.

There can be no dispute that the letter and attachments reflect the Federal Government's view that worldwide combined reporting implicates relations with foreign nations and thereby interferes with the Federal Government's exclusive power to conduct foreign affairs. As Secretary Brady's response to Governor Deukmejian's letter declares:

> [P]roblems persist with our trading partners over states' use of the unitary method. Because of this issue's continuing international implications, it is not exclusively a state tax issue. We believe that states' use of the worldwide unitary tax method may constitute an impermissible interference in the conduct of the nation's foreign affairs . . . .

Letter from Secretary of the Treasury Nicholas Brady to George Deukmejian, Governor of California (August 3, 1989) (J.A. 43).

If there was any doubt about the Federal Government's position that worldwide combined reporting as applied to a U.S.-based multinational group "implicates foreign policy issues which must be left to the Federal Government," the Federal Government's wholehearted endorsement of Colgate's first petition for review of this case in the California Supreme Court surely removed it. *See* letter from Assistant Secretary of the Treasury Kenneth Gideon to Jerry Jasinowski, J.A. 50-51. One of the central claims in the petition for review was that worldwide combined reporting as applied to U.S.-based multinational groups implicates foreign policy concerns that must be left to the Federal Government. *See* Petition for Review of the First Decision of the Court of Appeal at 6-14. In fact, the very premise of Colgate's statement of position in the petition was that the Federal Government's views are firmly rooted in foreign policy concerns. The Federal Government has approved Colgate's statement of position, without reservation. Not only does the Federal Govern-

ment refer to the petition as making "very effective use of Treasury's opposition to the use of worldwide unitary tax by the states" (J.A. 51), it also states that Colgate's petition fully encompasses the Federal Government's position. Indeed, Assistant Secretary Gideon's letter maintained that there was no need for the Federal Government to file a brief in this case because such a brief would merely duplicate Colgate's petition for review. *Id.*

B. "Competitive Balance" for Domestic Corporations Is an Integral Part of Federal Foreign Policy and Therefore Requires Invalidation of Worldwide Combined Reporting as Applied to U.S.-Based Multinational Groups if Worldwide Unitary Combination Is Found Invalid as to Foreign-Based Multinational Groups

If the Court finds in *Barclays* that worldwide combined reporting is invalid as applied to foreign-based multinational groups for reasons that do not, by their own force, apply to U.S.-based multinational groups, foreign policy considerations of "competitive balance" would independently compel the conclusion that the Foreign Commerce Clause protects a U.S.-based multinational group from worldwide combined reporting.

If California were to apply worldwide combined reporting to U.S.-based multinationals but not to foreign-based multinationals, U.S.-based multinationals would be at a considerable competitive disadvantage in the international marketplace. For example, worldwide combined reporting would continue to pose restrictions to U.S.-based companies seeking to invest abroad, restrictions that would no longer face foreign-based companies seeking to invest in the U.S. Moreover, disparate treatment of U.S.-based and foreign-based multinationals would result in similarly situated taxpayers being subject not only to differing tax burdens, but also to differing administrative burdens.

Recognizing the importance of maintaining a level playing field, the Federal Government has repeatedly stated that the maintenance of competitive balance for

domestic corporations is an integral part of United States foreign policy. Accordingly, insofar as California's application of worldwide combined reporting to U.S.-based multinational groups interferes with the competitive equality of United States business, it interferes with the ability of the Federal Government to "speak with one voice" in a matter of foreign policy.

The importance to United States foreign policy of competitive equality for U.S.-based business has been stressed consistently by those responsible for conducting United States foreign policy. As Secretary of State George Shultz declared in an official Department of State policy statement:

> The strength of the United States in world affairs, including the achievement of our political and security aims, rests directly upon the foundation of a healthy economy. Particularly important in this regard is our nation's vitality *and competitiveness in the international marketplace. Foreign economic and commercial policy is an integral and important element of overall foreign policy.*

Policy Statement on Assistance to U.S. Businessmen, Memorandum for All Assistant Secretaries and Bureau Directors from Secretary of State George Shultz (May 12, 1987) quoted in 133 Cong. Rec. E2723 (1987) (emphasis supplied). Similarly, the Department of State has more recently reiterated the Department's commitment to ensuring competitive equality for American business and outlined a "bill of rights" for American business in the context of United States foreign policy. This includes the right to "[b]e assured that the ground rules for the conduct of international trade are fair and nondiscriminatory." Deputy Secretary of State, Lawrence Eagleburger, quoted in Jim Pinkelman, *Department "Gets Down to Business" by Assisting U.S. Firms, Promoting American Exports,* Vol. 2 No. 17, U.S. Dep't of State Dispatch 306 (April 29, 1991).

Elaborating on these considerations of competitive equality, a letter from the Department of the Treasury to

Governor Deukmejian regarding California's water's-edge legislation emphasizes "the Administration's desire for equitable state tax treatment of foreign and domestic corporations." Letter from Assistant Secretary of the Treasury J. Roger Mentz to George Deukmejian, Governor of California (April 8, 1987) (J.A. 24). Dubbing this "The Equity Issue," Treasury urged California to agree that "place of incorporation should be irrelevant" and that "there is no valid policy justification" for California subjecting U.S.-based and foreign-based multinational groups "to different tax regimes." J.A. 25-27.[13]

More recently, Treasury has reaffirmed its view that considerations of competitive balance require equal treatment of U.S.-based and foreign-based multinational groups and that neither should be subjected to worldwide combined reporting. Treasury declared that "[a]s a tax policy matter, we are equally opposed to the use of worldwide unitary apportionment to determine the income of domestic-parent multinational corporations and that of foreign-parent multinational corporations." Letter from Assistant Secretary of the Treasury Kenneth Gideon to Jerry Jasinowski, President, National Association of Manufacturers (November 1, 1991) (J.A. 50). Treasury further observed that it had testified before Congress that treaty-based limitations on worldwide combined reporting were less desirable than state or federal legislative restrictions on such reporting "*precisely because they would benefit foreign-parent multinationals but not domestic-parent multinationals and thus not 'satisfy the principle of ensuring competitive balance among similarly situated businesses.'*" *Id.* (citing testimony of J. Roger Mentz, Treasury Assistant Secretary (Tax Policy), before the Subcommittee on Taxation and Debt Management of the Senate Finance Committee, Sept. 29, 1986, p. 3) (emphasis supplied). Treasury concluded that "[o]ur position has not changed." *Id.* *See also* letter from Treasury Secretary Nicholas Brady to Reuben Mark, President, Chairman, and Chief Executive Officer of Colgate (September 13, 1991) (J.A. 35).

[13] Moreover, any taxing scheme that attempts to differentiate between U.S.- and foreign-based groups on the basis of the place of incorporation is fraught with problems in light of the fact that many foreign-based groups contain sub-groups that have the United States as their place of incorporation, and, similarly, many U.S.-based companies have sub-groups incorporated overseas.

In short, competitive balance is an issue that is inextricably interwoven with federal foreign policy concerns and is protected under the "one voice" standard of the Foreign Commerce Clause. If the Foreign Commerce Clause proscribes worldwide combined reporting for foreign-based multinational groups, such reporting is likewise proscribed for U.S.-based multinational groups. The court below therefore erred in dismissing Colgate's Foreign Commerce Clause argument on the theory that federal policy against worldwide combined reporting insofar as it applied to U.S.-based multinational groups rested solely "on 'competitive balance' grounds" (Pet. App. E at 61a).

C. The Foreign Commerce Clause Demands Equal Treatment of U.S.-Based and Foreign-Based Multinational Groups with Respect to Worldwide Combined Reporting

Wholly apart from Colgate's foreign policy-based contention that "competitive balance" considerations preclude California from requiring Colgate to report on a worldwide combined basis if a similar requirement may not be imposed on foreign-based multinationals, basic principles of Commerce Clause analysis independently require that Colgate be accorded the same treatment accorded foreign-based multinationals.

This Court has held that the Commerce Clause forbids the states from preferring one form of "protected" commerce over another. The Court addressed this question in *Boston Stock Exchange*, where it struck down a state tax statute that favored one form of interstate commerce over another. The Court explicitly rejected the view of the New York Court of Appeals that discrimination between different types of transactions in interstate commerce was permissible. *Boston Stock Exchange*, 429 U.S.

at 333. In particular, the Court disapproved discrimination between different forms of protected commerce where such discrimination would cause a "diminution of free competition," a result the Court viewed as "wholly inconsistent with the free trade purpose of the Commerce Clause." *Id.* at 336.

The same analysis requires that U.S.-based multinational groups engaged in foreign commerce be accorded the same treatment accorded foreign-based multinational groups engaged in foreign commerce. If California were permitted to apply worldwide combined reporting to U.S.-based multinational groups like Colgate and its affiliates, which are engaged in foreign commerce,[14] but not to foreign-based multinational groups like Barclays and its affiliates, which are likewise engaged in foreign commerce, the resulting competitive advantage to foreign-based multinational groups would seriously undermine the level playing field for different forms of protected foreign commerce and with it the free trade concerns protected by the Commerce Clause.

The necessity for equal treatment for all forms of protected commerce was reemphasized last term when the Court struck down a state taxing scheme that favored interstate over foreign commerce. *See Kraft*, 112 S.Ct. 2365. In addition, in a decision that this Court affirmed by an equally divided Court, the California Court of Appeals explained:

> Discrimination between (1) interstate transactions and foreign transactions cannot be distinguished from (2) discrimination between two types of interstate transactions. Both interstate and foreign transactions

[14] This Court has recognized that U.S.-based multinational groups with foreign operations engage in foreign commerce. *See Container*, 463 U.S. at 188-89 ("[T]he tax here falls . . . on a corporation domiciled and headquartered in the United States. We specifically left open in *Japan Line* the application of that case to 'domestically owned instrumentalities *engaged in foreign commerce*' . . . this case falls clearly within that reservation" (emphasis supplied)).

> are brought within the control of Congress by the same clause of the United States Constitution.

Zee Toys, Inc. v. County of Los Angeles, 85 Cal. App. 3d 763, 775, 149 Cal. Rptr. 750, 758 (2d Dist. 1978), *aff'd by an equally divided Court sub nom. Sears, Roebuck & Co. v. County of Los Angeles*, 449 U.S. 1119 (1981). Hence the Commerce Clause prohibits a taxing scheme that favors foreign commerce conducted through foreign-based multinational groups over foreign commerce conducted through U.S.-based multinational groups. It therefore requires that U.S.-based multinational groups be spared the burden of worldwide combined reporting if such burden may not be imposed on foreign-based multinational groups.

Although the Court found it unnecessary to reach this issue in *Container*, several members of the Court made it clear that invalidating worldwide combined reporting as applied only to foreign-based multinationals would be unacceptable because "[i]t would leave California free to discriminate against a Delaware corporation in favor of an overseas corporation." *Container*, 463 U.S. at 203 (Powell, J., dissenting). In short, if California's worldwide combined reporting requirement as applied to foreign-based multinational groups violates the Commerce Clause, then application of the same requirement to U.S.-based multinational groups such as Colgate cannot withstand constitutional scrutiny.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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